IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1972

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No. 72-1625

RONALD EUGENE ALL,
Petitioner,

vs.

STATE OF NORTH CAROLINA
Respondent.

CARLTON OSCAR WEAVER,
Petitioner,

vs.

STATE OF NORTH CAROLINA
Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO JOINT PETITION FOR WRITS OF CERTIORARI

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OPINION BELOW

From a verdict of guilty of the offense of felonious breaking and entering and felonious larceny, and judgments of imprisonments entered by the Superior Court on the 11th day of May, 1972, defendants, Ronald Eugene All and Carlton Oscar Weaver, appealed to the North Carolina Court of Appeals. The opinion of the North

Carolina Court of Appeals (Intermediate Appellate Court) affirming the convictions of the trial court is reported in 17 N.C. App. 284, 193 S.E. 2d 770 (1973). The defendants joint petition for Writs of Certiorari to the North Carolina Court of Appeals was denied by the Supreme Court of North Carolina by judgments entered on March 6, 1973.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I.

IS IT CONSTITUTIONALLY PERMISSABLE UNDER THE FOURTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES FOR STATE LAW ENFORCEMENT OFFICERS TO CHECK THE CARGO INCIDENT TO A DETENTION OF A VEHICLE ON THE SIDE OF THE ROAD FOR A TRAFFIC VIOLATION WHEN SUCH INVESTIGATION IS CONDUCTED WITHOUT A SEARCH WARRANT?

II.

DOES THE TEST OF "HARMLESS CONSTITUTIONAL ERROR" IN CRIMINAL TRIALS UNDER *FAHY V. CONNECTICUT* AND *CHAPMAN V. CALIFORNIA* REQUIRE A REVERSAL IN EACH CASE WHERE CONSTITUTIONAL ERROR IS COMMITTED REGARDLESS OF THE INTENSITY OF COUNTERBALANCING EVIDENCE?

CONSTITUTIONAL PROVISIONS INVOLVED (EXCERPTED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES)

ARTICLE (IV.)

THE RIGHT OF THE PEOPLE TO BE SECURE IN THEIR PERSONS, HOUSES, PAPERS, AND EFFECTS, AGAINST UNREASONABLE SEARCHES AND SEIZURES, SHALL NOT BE VIOLATED, AND NO WARRANTS SHALL ISSUE, BUT UPON PROBABLE CAUSE, SUPPORTED BY OATH OR AFFIRMATION, AND PARTICULARLY DESCRIBING THE PLACE TO BE SEARCHED, AND THE PERSONS OR THINGS TO BE SEIZED.

ARTICLE (V.)

NO PERSON SHALL BE HELD TO ANSWER FOR A CAPITAL, OR OTHERWISE INFAMOUS CRIME, UNLESS ON A PRESENTMENT OR INDICTMENT OF A GRAND JURY, EXCEPT IN CASES ARISING IN THE LAND OR NAVAL FORCES, OR IN THE MILITIA, WHEN IN ACTUAL SERVICE IN TIME OF WAR OR PUBLIC DANGER; NOR SHALL ANY PERSON BE SUBJECT FOR THE SAME OFFENCE TO BE TWICE PUT IN JEOPARDY OF LIFE OR LIMB; NOR SHALL BE COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST HIMSELF, NOR BE DEPRIVED OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR SHALL PRIVATE PROPERTY BE TAKEN FOR PUBLIC USE WITHOUT JUST COMPENSATION.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

The petitioners were charged on bills of indictment with the offense of felonious breaking or entering and felonious larceny. On May 8, 1972, petitioners appeared in the Superior Court of Chatham County with counsel and entered a plea of not guilty. The trial started immediately and, at the close of all of the evidence, a verdict of guilty was returned, as to both defendants to the offenses of breaking and entering and larceny. From these verdicts and judgment of imprisonment, the petitioners appealed. The North Carolina Court of Appeals affirmed these convictions and the Supreme Court of North Carolina denied the defendants joint petition for Writs of Certiorari. Copies of the opinions of the North Carolina Court of Appeals and the Supreme Court of North Carolina are appended to the petition.

STATEMENT OF FACTS

The petitioner, Ronald Eugene All, accompanied by petitioner, Carlton Oscar Weaver, was stopped by an officer of the Virginia State Police on March 20, 1971. The officer had observed the petitioner, All, driving a truck with a portion of its windshield obscured by a piece of cardboard. Under a Virginia statute, driving with any obstruction over the windshield is a traffic violation. Code of Virginia, Sec. 46.1-290.

While the petitioners were pulled to the side of the road, the officer inspected the driver's license, registration card, and license tag and found that the truck was registered in the name of the petitioner, Weaver's wife. (Rp. 11) When the officer walked to the rear of the truck, he could see something inside the truck bed and he could, also, smell the odor of ham emanating from the vehicle. (Rp. 11) The officer then stepped up upon a tire on the side of the truck and peered into the open bed thereof at the cargo which consisted of several hundred loose hams and several packages of refrigerated type sliced ham. (Rpp. 12 and 14) There was further testimony from the officer, that he could not let the defendant drive the truck off in the condition that it was in. (Rp. 16) And, in that the defendant driver was from out-of-state, he was arrested rather than cited. (Rp. 14) Subsequent to this arrest, the officers received a radio broadcast regarding a breaking and entering of a meat packing plant in North Carolina which related the theft of

a large quantity of hams. (Rp. 17) There was possible inadmissable evidence in the record of the trial below regarding certain bolt cutters. (Rp. 19) (although it is arguable that probable cause for the search revealing the bolt cutters existed independent of the inadmissible confession) There was sufficient, strong, and convincing counterbalancing evidence regarding clearly identified hams in plain view in a open truck, (Rp. 12), fibers from a sweater similar to the one worn by the petitioner, Weaver, found at the point of the break-in, (Rpp. 45-57), and a truck matching the description of the vehicle driven by the petitioner, All, seen in the vicinity of the packing plant on the night of the robbery (Rpp. 27-28). The hams observed in the open bed of the truck and partially visible through open boards on the side of the vehicle bore the name, Hickory Mountain Farms, (Rp. 12) which was the business reporting the theft. (Rpp. 26-31).

The State will accept the petitioners' view of the remaining evidence insofar as it does not disagree with the above additions and explanations.

ARGUMENT

The petitioners' principal argument for the granting by this Court of their joint petition for Writs of Certiorari are founded upon their belief that the North Carolina Court of Appeals advanced invalid reasons to uphold their convictions below. The defendants, specifically, complain that the lower court should not have justified the investigation of the contents of the truck driven by the defendants upon the ground that such examination was proper to safeguard its contents while the vehicle was being taken in because of its inoperable condition. (windshield was then missing on the drivers side of the vehicle and a piece of cardboard had been inserted) The defendants make a number of arguments to the effect that there was no Virginia State Statute allowing an impoundment for a missing or an obscured windshield; that there was no reason to take the truck into custody in Virginia, (there being an absence of a regulatory statute reguiring windshields); and that the investigation amounted to a sham inventory designed to coverup an illegal search.

The State will answer the petitioners' arguments broadly by citing Mr. Justice Douglas' concurring opinion in the case of *Harris*

v. U.S. 390 U.S. 234 (1968) which opinion is cited, also, by the petitioners. (for the proposition that the truck that was searched was unlawfully in police custody) In the *Harris* case, (supra), the defendant was arrested on a robbery charge and his car, pursuant to statute, was impounded. The State statute in that case allowed officers the right to search the impounded automobile for valuables in order to secure them for the owner. And, while the car was parked, after being taken in, a police officer discovered a registration card (indicating vehicle belonged to another) on the front seat when opening a door to roll up a window. Mr. Justice Douglas, in concurring with the majority which upheld the introduction into evidence of the registration card as not being the fruit of an illegal search, made these findings at pages 236 and 237 of that opinion:

> "Though *Preston v. U.S.*, 376 U.S. 364, is not mentioned in the Court's opinion, I assume that it has survived because in the present case (1) the car was lawfully in police custody, and the police were responsible for protecting the car; (2) while engaged in the performance of their duty to protect the car, and not engaged in an inventory or other search of the car, they came across incriminating evidence".

The State of North Carolina will strongly submit that the attributes of the police investigation of petitioners' truck were within the scope of Mr. Justice Douglas' guidelines. In this case, the truck had seriously defective equipment, (no windshield on drivers side–Rp. 11), which condition posed a hazard to both the petitioners themselves and the travelling, public. And, due to the extremity of this hazard, (as opposed to a single defective taillight, etc.), it was imperative that the truck be removed from the highway immediately. This preliminary restraint of the vehicle at the scene leading to what the investigating officer knew to be a more lengthy impoundment while the windshield was being installed was entirely lawful. It would make little difference that the investigation of the contents of the truck was made upon the temporary impoundment on the side of the road prior to the arrest or subsequent thereto. The necessity that the windshield would, in all events, need to be replaced and the truck impounded during this repair was apparent to the arresting officer at the time he first signaled the truck to the side of the road. At that moment, (before the arrest), the officer could validly see the need for an investigation of the contents of

the truck with the thought of safeguarding them for return to the owner when the truck was towed in and the problem corrected. The discovery of the hams, therefore, at this juncture, before the petitioner's arrest for reckless driving would not have stronger attributes of the officer, "looking for evidence". than after his arrest. It should be considered, therefore, that the truck was in lawful police custody. Further, it can be argued that the discovery of the hams was effected during the officer's performance of his duty to protect the truck and its cargo. And, during the performance of his duties as a police officer, (ie. checking license against registration on mechanically defective vehicle in a place where he had a lawful right to be), the officer viewed something in the truck that smelled like ham. (Rp. 11) The officer's looking over the side of the open truck to decide the quantity and nature of the cargo which resulted in his aroused suspicions with regard to the large quantity of unrefrigerated perishable hams presented circumstances which were certainly analogous to *Harris v. United States*, 390 US 234 (1968). In that case, an officer, while raising a window upon a defendant's car to protect it during an investigation of the defendant himself, discovered a registration card indicating ownership of the vehicle of another lying openly upon the car seat. In each instance, perishable items (interior of car and unrefrigerated ham) were sought to be protected from the elements.

It should be noted that in Mr. Justice Douglas' opinion, (supra), he condemns an investigation of an automobile without a search warrant or during an inventory. The State would interpret that the "inventory" to which Mr. Justice Douglas refers in his concurring opinion is not identical to, nor comprehends, the type of "inventory" alluded to by the North Carolina Court of Appeals in its decision below. It is submitted that Mr. Justice Douglas is speaking of "sham" inventories in those cases where unnecessarily detailed searches are made under the guise of an inventory unrelated to the safeguarding of cargo or protecting it from spoilage. Often, these inventories are made upon a "routine" or "trumped up" traffic charge. See *People v. Muniz*, 4 Cal. App. 3d 562, 84 Cal. Rptr. 501; *Commonwealth v. Dussell*, 439 Pa 392, 266 A 2d 659.

When we consider the above aspects of the investigation of the petitioners' truck, it can be argued that the guidelines for the investigation of a vehicle without a search warrant as enumerated by Mr. Justice Douglas have been met in the present case.

The State, having generally answered the major question presented by the petitioners, will now briefly examine certain subsidiary points raised with regard to the impoundment question. The petitioners excerpt certain Virginia statutes to show the lack of State authority to impound the truck and, upon this basis, argue that a search was not lawful. The State has previously discussed the very real necessity, (ie. visually defective equipment), that prompted the initial restraint of the truck. The defendants seem to be arguing that the rest of the windshield glass could be removed, (or in this case, the cardboard removed), and the truck could have gone along its way, there being no legal basis for detaining it. The State would submit that the truck, operating with cardboard in its windshield, was in clear violation of Virginia law. Section 46.1-290 of the Virginia Code contains a clear prohibition against the placing of nontransparent materials, (here cardboard), upon windshields of motor vehicles. The truck, therefore, (regardless of the fact that the cardboard could be removed), was, by law, at that time not in a condition to be operated upon the highways of the State of Virginia and, until fixed, would have to remain on the right of way of U.S. Highway No. 220. (Rp. 11) Whether the cardboard could or could not be removed is not the question; the fact is that it was not removed and the truck, by statute, could not be operated. The vehicle, therefore, existing in a condition that prohibited its movement, would constitute a hazard for oncoming motorists who should require the use of that portion of the right of way. Section 46.1-2 of the Virginia Code provides that if a vehicle is left on the highway in a position which constitutes a hazard to traffic, or if it is left unattended on the highway for more than twenty-four hours, "the police may remove it or have it removed to the nearest storage garage for safekeeping". (emphasis added). The criteria of this statute are clearly met in the present case. The truck, on account of its statutorily defective equipment, would have to be left on highway right of way and would therefore, constitute a hazard. The statute further provides that "the police may remove it or have it removed to the nearest garage for safekeeping." The fact that the truck was parked outside of the jail building rather than in a storage garage was no indication that it was not to be taken to such a facility for safekeeping. The defendant was taken from the scene of the original arrest to the jail, advised of his constitutional rights, asked a few questions, and taken to the magistrate for a bond hearing. (Rpp. 7-21) It would be reasonable that the truck which had been driven by the petitioners would be

parked temporarily outside of the jail while these more pressing matters were being taken care of inside the building. In any event, the final disposition of the truck would not invalidate the initial safeguard investigation on the highway preparatory to its detention. (It should be noted that, independent of any right of investigation prior to an impoundment, Section 46.1-8 of the Virginia Code authorizes uniformed officers to stop and inspect vehicles. (including an investigation of its load)*

For the sake of argument, if it should be found that the theory that the hams were discovered during an examination to safeguard them pursuant to a contemplated detention of the truck is unavailing, the investigation and discovery can be justified upon other grounds. The State would urge that the hams found in the petitioners' truck were in "plain view" and that the evidence introduced concerning their discovery was not a product of a search. Where no search arises, the constitutional guarantee against unreasonable searches and seizures is not applicable. 47 Am. Jur., *Searches and Seizure*, Section 20; *State v. DuBoise*, 279 N.C. 73, 181 SE 2d 393 (1971). It has been established that, under certain circumstances, the police may seize evidence in plain view without a warrant. The "plain view" doctrine has been applied where a police officer is not searching for evidence against the accused, but, inadvertantly, discovers an incriminating object. *Coolidge v. New Hampshire*, 403 U.S. 443, 29 Law Ed. 2d 564, 91 S. Ct. 2022. (1971). A search ordinarily involves prying into hidden places, and a seizure contemplates forcible dispossession. However, a police officer may seize and use what he sees in plain sight if he is at a place where he lawfully entitled to be. *Ker v. California*, 374 U.S. 23, 10 L. Ed. 2d 726, 83 S. Ct. 1623 (1963); *State v. Fry*, 13 N.C. App. 39, 185 SE 2d 256 (1971).

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*Section 46.1-8 of the Virginia Code provides as follows: *Stopping vehicles for inspection or to secure information....Any peace officer who shall be in uniform or who shall exhibit his badge or other sign of authority shall have the right to stop any motor vehicle, trailer or semitrailer, upon request or signal, for the purpose of inspecting the motor vehicle, trailer or semitrailer as to its equipment and operation, its manufacturers serial or engine number or its contents or load, if such motor vehicle, trailer or semitrailer is a property carrying vehicle or for the purpose of securing such other information as may be necessary.* (Code 1950, § 46-16; 1958, c-541).

> "What the plain view cases have in common is that the officer in each of them has a prior justification for an intrusion in the course of which he came inadvertantly across a piece of evidence incriminating the accused". *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971). (See also *Harris v. United States*, 390 U.S. 234, 19 L. Ed. 2d 1067, 88 S. Ct. 992.)

In the present case, the State would contend that, at the time of the petitioners' detention on the side of the road for a serious safety violation, the officer, during an examination of the outside of the truck, was in a place that he had a legal right to be. And, that while investigating the exterior of the vehicle, he could see something inside and could, also, smell the odor of ham lying in the open bedded truck. (Rp. 11). The perishable hams in the truck, therefore, were within his "plain view". No search warrant was required for him to investigate "hidden places" for them. The "plain view" doctrine does not mean, as applied to this case, that the article could not be in plain view unless the officer could see it as he stood erect. There would be no question that the hams would be in plain view if the officer had climbed a tree or his own car, or had been on a hill and looked down into the truck and saw the hams. In accord, See, *State v. Mallory*, 336 S.W. 2d 383, cert. den. 364 U.S. 852, 5 L. Ed. 2d 75, 81, S. Ct. 99, reh. den. 364 U.S. 925, 5 L. Ed. 2d. 264, 81, S. Ct. 287. (1960, Mo.); *Goodwin v. U.S.*, 121 App. D.C. 9, 347 F. 2d. 793, cert. den. 382 U.S. 855, 15 L. Ed. 2d. 93, 86 S. Ct. 107, cert. den. 382 U.S. 920, 15 L. Ed. 2d. 234, 86 S. Ct. 298, cert. den. 382 U.S. 920, 15 L. Ed. 2d. 234, 86 S. Ct. 300; *State v. Brinkley*, 25 Conn. Supp. 216, 200 A. 2d. 247 (1963); *State v. Fry*, 13 N.C. App. 39, 185 SE 2d 256.

If we should assume that the act of the officer in climbing upon the vehicle was a search, it was not an unreasonable search prohibited by the Fourth Amendment.

> "An unreasonable search has been defined as 'an examination or inspection without authority of law of one's premises or person, with a view to the discovery of... some evidence of guilt, to be used in the prosecution of a criminal action.' 47 Am. Jur.,

Searches and Seizures, Sec. 52". *State v. Ratliff*, 281 N.C. 397 (1972)

The officer was clearly not looking for evidence (upon the initial detention on the side of the highway for a traffic violation), to be used in the prosecution of a criminal action. There was absolutely no nexus between the hams and any criminal behavior at the time one of the petitioners was arrested for reckless driving. See *State v. Howard*, 274 N.C. 186, 162 SE 2d 495 (1968).

In concluding its remarks concerning this phase of its answer to the petitioners' joint petition for writs of certiorari, the State would remark that the petitioners cite *Holland v. State*, 93 Okla. Cr. 180, 226 P. 2d. 448 (1951) as supportive of a position that a sham inventory was conducted in the present case.

In *Holland* (supra), deputies waited for a truck known to be carrying intoxicating liquor and "trumped up" a charge of reckless driving as a pretext for a warrantless search of the truck. (deputy climbed up on truck to view the liquor) The dissimilarities in the two cases are too apparent for further discussion.

The defendant, also, (with regard to sham inventories) cites *U.S. v. Adams*, 424 F 2d 175 (5th Cir. 1970), wherein the defendant was stopped while intoxicated and arrested. While at the jail, his vehicle was searched for identification of its ownership and evidence was found that it had been stolen. The Sheriff contended that the search was in preparation for the impoundment of the vehicle. The court held that the search was in violation of the defendant's Fourth Amendment rights. It is interesting to note that in *Adams* (supra), the police searched the vehicle in great detail, even to the extent of removing a part of the rear seat to enter the trunk.

The defendant, also, argues that the North Carolina Court of Appeals adopted an erroneous standard for its application of this Court's "Harmless Constitutional Error Doctrine". Specifically, the petitioners complain of the lower court's holding that the admission into evidence of the bolt cutters, although possibly erroneous, (as based upon unlawfully obtained confession and warrantless search too remote from arrest), was, notwithstanding, harmless error because the remaining evidence was more than sufficient to support the convictions. The petitioners then cite *Fahy v. Connecticut*, 375

US 85 (1963) and *Chapman v. California*, 386 US 18 (1967) for the proposition that the harmless error standard that should have been applied by the lower court, (in consonance with these opinions by this Court), should have been whether there was a reasonable possibility that the evidence complained of might have contributed to the conviction.

The State would respond to this argument raised by the petitioners by citing *Chapman* (supra), the identical case relied upon by the petitioners. In that case at pages 21 and 22, this Court stated:

> "We are urged by petitioner to hold that all federal constitutional errors, regardless of the facts and circumstances must always be deemed harmful ... we decline to adopt any such rule .... We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless not requiring the automatic reversal of the conviction." (The evidence complained of related to the prosecutor's repeated references to the defendant's failure to testify).

Considering this language from *Chapman* (supra), the State would aver that this Court would weigh the evidence in the application of its Harmless Error Standard. The State would not interpret this case to mean, (as the petitioners contend), that this Court would require a reversal in every instance that a constitutional error was present in the record. Clearly, the Court felt in *Chapman*, (supra), that the repeated mention of the defendant's failure to testify so tainted the entire proceeding that the jury could not have rendered a fair verdict. It is, also, apparent that this Court felt in *Fahy v. Connecticut*, 375 US 85 (1963) that the introduction into evidence of a can of black paint was of such significance as to irreparably damage the entire proceeding. In *Fahy*, (supra), unlawfully obtained evidence of a can of black paint, (used in painting swastikas on synagogues), became the focal point in every phase of the trial to connect the defendant to the offense charged.

These cases are markedly dissimilar to the case now under consideration. In this proceeding, there exists in the transcript of

the trial possibly inadmissible evidence concerning bolt cutters. A preponderance of valid evidence, exclusive of this supposedly inadmissible evidence, remained in the setting of this case to render such error harmless. *Chapman v. California*, 386 US 18 (1967). In addition to the evidence concerning the petitioners' cargo of perishable hams containing markings indicating the name of the packing company from which a theft of such hams was reported, (Rpp 12 and 29), there was evidence in the record of fibers from a sweater similar to the one worn by Mr. Weaver having been found at the break-in, (Rpp 45-57), and of a truck matching the general description of the one driven by the defendant, all, in proximity to the packing plant on the night of the robbery. (Rpp 27-28).

The remaining evidence in the record of this proceeding in no way related to the evidence of bolt cutters. And, standing independently, required no support from such evidence for its validity, possessing sufficient strength upon its own ground to support petitioners' convictions.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the joint petition for writs of certiorari should be denied. The respondent submits that the facts of this case showed no violation of the petitioners' rights, constitutional or otherwise.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Charles M. Hensey, Assistant Attorney General with the North Carolina Department of Justice and Counsel for the State of North Carolina, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 31st day of August, 1973, I served three copies of the Brief of Respondent, State of North Carolina, in opposition to Joint Petition for Writs of Certiorari on counsel representing Petitioners, Ronald Eugene All and Carlton Oscar Weaver as follows:

By mailing three copies each in a duly addressed envelope, first class postage prepaid, to Brice I. Bishop and Thomas Canafax, Jr., of the law firm of Shimmel, Hill and Bishop, Attorneys at Law, 1819 H Street, N.W., Washington, D. C. 20006; to Thomas F. Loflin, III, of the law firm of Loflin, Anderson and Loflin, P. O. Box 1315, Durham, North Carolina 27702; to Mitchell M. McEntire (who did not execute the said joint petition but who, also, appeared as attorney below) of the law firm of Harris and McEntire, Attorneys at Law, P. O. Drawer 471, Graham, North Carolina 27253.

It is further certified that all parties required to be served have been served.

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